

3. Did claimant's alleged accidental injury arise out of and in the course of claimant's employment?
4. Is claimant entitled to future medical treatment?
5. Is claimant entitled to unauthorized medical allowance?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidence and considering the arguments, the Appeals Board concludes the Award should be affirmed.

The dispute in this case concerns the significance of videotapes taken of claimant preparing to paint and painting a small, one-story duplex owned by claimant and his father.

Claimant alleges injury at work from June 1996 through January 8, 1997. Claimant's job required that he grasp panes of glass and move them from a conveyor belt to pack them in a crate. He spent approximately one-half of his 12-hour shift performing this task and alleges the work caused injury to both upper extremities.

The treating physician, Dr. Bruce Silverberg, initially diagnosed bilateral tennis elbow and eventually considered surgery as a possible treatment. But after Dr. Silverberg saw videotapes of claimant, taken by respondent's investigator, Dr. Silverberg concluded claimant was making a fraudulent claim. He opined that claimant should not be given any benefits.

When the parties could not agree on claimant's functional impairment, the ALJ referred claimant to Dr. Lanny W. Harris for an independent medical examination. Dr. Harris reviewed records of Dr. Silverberg and Dr. Ketchum and examined claimant on June 16, 1998. Dr. Harris assigned a 12 percent whole body impairment rating for bilateral upper extremity injury. But Dr. Harris did not view the videotapes. The ALJ awarded benefits based on the rating by Dr. Harris. Respondent now contends the Board should, instead, rely on the opinion of Dr. Silverberg and deny benefits.

The Board concludes the videotapes do not conflict with Dr. Harris' opinion. The video was taken while claimant was working for respondent driving a fork lift. He was not on temporary total disability or prohibited from working. Second, the video does not, in our view, show activities which would have violated the restrictions imposed by Dr. Silverberg. At the time, claimant was restricted from lifting over 20 pounds, frequently lifting or carrying more than 10 pounds. Although Dr. Silverberg was obviously impressed by the video, he testified he did not know whether any of the activities violated his restrictions. He also did not recall whether he had viewed the video on fast forward or regular speed. Claimant, on the other hand, testified that the work did not violate restrictions and testified to the approximate weights of the items he was lifting. Work which did not violate restrictions and

is not otherwise in conflict with claimant's testimony does not, in our view, suggest the claimant was presenting a false claim.

Dr. Harris, acting as an independent medical examiner, concluded claimant does have a disability. Although he did not view the video, he had Dr. Silverberg's records and knew of Dr. Silverberg's conclusion. Nevertheless, based on his own examination, Dr. Harris found claimant has a 12 percent whole body impairment. The Board agrees with and affirms the finding that claimant has a 12 percent disability based on functional impairment.

In addition to the above, the Board adopts as its own the findings and conclusions by the ALJ on this and other issues. This includes the finding that claimant is entitled to unauthorized medical expense and future medical expense on proper application.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Julie A. N. Sample on May 11, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale E. Bennett, Overland Park, KS
Michael H. Stang, Overland Park, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director